IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 377 OF 2006.

1. Shri Virendra Anandrao Pai Khot
(since deceased) through his Lrs

1 (a) Smt. Radha Virendra Pai Khot
major, widow of late
Shri Virendra Pai Khot.
1 (b) Shri Parashar V. Pai Khot
major, son of late
Shri Virendra Pai Khot
1 © Shri Parikshit V. Pai Khot
major, son of late Shri Virendra
Pai Khot.
All residents of House No. 1337,
Sheller, Canacona Goa.

2. Shri Sandes R. Kakodkar
and his wife Smt. Reema S. Kakodkar,
both residents of "Jayashree"
Kakoda – Curchorem,
Quepem, Goa. .... Petitioners.

Versus

1. Shri Joaquim Santan D'Souza,
son of Cruzinho D'Souza,
major, Toddy Tapper,
resident of Patnem, Canacona,
Goa (since deceased)
Through his legal representatives:

1(a) Mr. Thomas Samson,
major, married, son of
Joaquim Santan D'Souza and
his wife:
1(b) Mrs. Nelly Thomas D'Souza,
major, married,
both residents of Patnem,
Colomb, Canacona, Goa.
1.c) Mrs. Sifara Simon Diniz,
Daughter of Santan D'Souza,

major, married and her husband:
1 (d) Mr. Simon Diniz,
major, married,
both residents of Palolem,
Canacona, Goa.
1 (e) Mr. Simon J. D'Souza,
son of Joaqum Santan D'Souza,
major.
1 (f) Miss Sira D'Souza,
daughter of Joaquim Santan D'Souza,
major.
1 (g) Miss Seems J. D'Souza,
daughter of Joaquim Santan D'Souza,
major,
all residents of Patnem, Colomb,
Canacona, Goa.

2. Smt. Cruzinha Fernandes,
wife of Shri Joaquim Santan D'Souza,
resident of Patnem,
Canacona, Goa.

3. Shri Anand Shankar Sinai Nagarcekar,
son of Shri Shankar Sinai Nagarcekar,
resident of Vaishaka Apartments,
Ground Floor – 4,
Nagmode, Navelim,
Salcete, Goa.

4. Shri Franco D'Mello,
son of Shri Afonso D'Mello,
major, Landlord,
resident of Canacona
(since deceased) by his
Legal representatives:
4(a) Smt. Preciosa D”Mello.
4(b) Mr. Osvaldo J. D'Mello.
4(c) Mrs. Melita M. Vaz Nee D”Mello.
4(d) Miss Lira Cs. D”Mello.
4(e) Ms. Maria I. D'Mello,
(Respondents 4(a) to 4(e) deleted vide
Order dated 23.11.06) .... Respondents.

Mr. V. P. Thali, Advocate for the Petitioners.

Mr. C. A. Coutinho, Advocate for the Respondents No.1(c), 1(d), 1(f), 1(g) and 2.

CORAM: J. N. PATEL, J.

DATE: 6th DECEMBER, 2006.

ORAL JUDGMENT:

Heard.

2. Rule. By consent, Rule returnable forthwith.

3. The petition is filed by the original plaintiffs challenging the Order dated 21st July, 2006 passed by the appellate Court in dismissing their application for condonation of delay in preferring the appeal.

4. The petition rather highlights the manner in which errors have been committed by the Court and the Advocate putting the litigant in difficulty to the extent of the application of the plaintiffs for condonation of delay being rejected by the appellate Court.

5. The plaintiffs filed a suit for perpetual injunction before the Civil Judge J.D., Canacona which came to be registered as Regular Civil Suit No. 157/83 (old): Regular Civil Suit No. 73/88 (new). By Judgment and

Order dated 19th March, 1996 the trial Court though dismissed the suit, in the operative part of the Judgment i.e. in the Order, it recorded that:- " The suit of the plaintiffs stands decreed. No order as to costs. Decree shall be drawn accordingly. "

6. Being aggrieved by the Judgment and Decree passed by the trial Court the plaintiffs preferred an appeal which came to be registered as Civil Appeal No. 23/96 before the District Court, Margao. The same came to be withdrawn for the reason that as the decree was passed in favour of the plaintiffs, no appeal lay against the said finding on the basis of the decision of the Supreme Court rendered in the case of **Gangabai v/s Vijay Kumar** reported in **AIR 1974 SC 1126** and therefore the said Civil Appeal No.23/96 filed against the said decree dated 19.3.96 was dismissed as withdrawn. The defendants/respondents having realized the error which has crept in the order part of the Judgment, approached the trial Court by moving an application for correcting the said decree dated 19.3.96 which came to be registered as Civil Misc. Application No.32/97 and prayed for substituting the word "**dismissed**" in place of the word "**decree**" in the operative part of the Judgment on the basis of which the decree was drawn. This application was allowed by the trial Court by its Order dated 28.1.99.

7. One fails to understand why the original plaintiffs preferred an appeal in the matter when on earlier occasion the plaintiffs had rightly realized the error which was in the operative part of the Judgment that though in substance the suit of the plaintiffs was dismissed, in the operative part of the Judgment i.e. Order, it was noted as “decreed” and this appeal which was registered as Misc. Civil Appeal No.81/2003 came to be dismissed by the Addl. District Judge by Order dated 11.10.2004 and it is thereafter that the plaintiffs chose to challenge the original Judgment and Decree by preferring an appeal after delay of 124 days in filing the same along with the application for condonation of delay. It is this application that is Misc. Civil Application No.20/2005 which came to be rejected by the District Court after considering the facts and circumstances and by coming to the conclusion that the delay in filing the appeal had not been satisfactorily accounted and therefore the application was liable to be dismissed. Placing reliance in the case of **N. Balkrishnan v/s. M. Krishnamurthy** reported in **1998 (7) SCC 123**, it is submitted by the learned counsel appearing for the petitioners that the delay in preferring the appeal was supported by good and sufficient reason and unless the reasons given for condonation of delay were found to be dishonest and lacking good faith, the appellate Court ought not to have rejected the application.

8. The learned counsel for the respondents submitted that as the

appellate Court has found that as the delay has not been satisfactorily accounted, therefore the application was liable to be dismissed is justified. Further it has been contended that if at all, the application ought to have been moved under Section 14 of the Limitation Act instead of section 5 of the said Act.

9. Insofar as the contentions of the learned counsel for the respondents that the application ought to be under Section 14 rather than Section 5 of the Limitation Act, does not appeal to this Court for the very reason that the application for condonation of delay has to be under Section 5 of the Limitation Act which is the enabling provision, whereas Section 14 can be one of the reasons for consideration of application for condonation of delay.

10. This Court finds that the learned appellate Court has rejected the application without properly appreciating the background facts which led to causing of the delay. The learned lower appellate Court ought to have taken into consideration that the plaintiffs have been diligent in prosecuting the matter at the very first instance when their suit was dismissed, they have approached the appellate Court in time by preferring an appeal but then due to an inadvertent error in the operative part of the judgment delivered by the trial Court their appeal came to be dismissed as withdrawn.

The appellants/original plaintiffs were left with no choice and the responsibility will have to be shared for the delay by the Court itself.

11. It is trite law that litigants should not suffer for the mistake on the part of the Court or his lawyer. This was a fit case where the lower appellate court ought to have condoned the delay as in the opinion of this Court the petitioners/appellants have given good and sufficient reason as to how and in what manner the delay has been caused in preferring appeal.

12. Therefore, the impugned Order is quashed and set aside. The application for condonation of delay is allowed. Rule is made absolute in the aforesaid terms with no order as to costs.

J. N. PATEL, J.

sl.